WP(C) 2565/2007
BEFORE
THE HON'BLE MR JUSTICE B.K. SHARMA

JUDGMENT AND ORDER

Both the writ petitions assailing the particular tender process have bee n heard together and are being disposed of by this common judgment and order. Th e petitioners being aggrieved by the particular clause in the NIT rendering them ineligible to participate in the tender process have invoked the writ jurisdict ion of this Court assailing the legality and validity of the same with further p rayer to issue a writ of mandamus directing the respondents to allow the petitio ner to participate in the tender process.

2. The respondent corporation has issued the NIT dated 13.4.2007 inviting t enders for charter hiring of 3 nos. of Steam Generating Units (SGU) for a period of 6 months in its website. The tender documents were to be issued from 13.4.20 07 to 23.4.2007 and the bids were to be opened on 1.5.2007. Be it stated here th at the tender involves two bids system. The pre qualification criteria has been indicated in the NIT, which is quoted below:

Pre qualification criteria
(Note: The tender document will be issued to those bidder(s) who furnish origina l documents meeting the pre-qualification criteria , within 10 days of publicati on of the tender on the website.
Bidder must fulfill the following pre-qualification criteria :

A 1 Bidders should have minimum six months experience of providing services fo r Steam Generating Unit/boiler on Charter Hire Or on Operation and Maintenance b asis to Oil & Gas Companies. Bidders should have executed atleast 01 (1) contrac t of the above nature during last 5 years ending last day of the month previous to the one in which bids are invited and should submit documentary evidence to t his effect in the form of satisfactory completion of services from reputed clien ts

A 2 : In case the bidder is an Indian Company/Indian Joint Venture Company, eith er the Indian company/Indian Joint Venture Company or its technical collaborator /joint venture partner should meet the criteria laid down at A 1 above.

3. According to the petitioners the SGU can only be operated by a Boiler At tendant like that of the petitioners, who allegedly passed specified course for the purpose. It is the case of the petitioners that none of the contractors have any such qualification and/or conferred with any such licence, rather each of t hem operated the SGU through a Boiler Attendant like the petitioners. It is the further case of the petitioner that the aforesaid stipulation made in the NIT as the pre-qualification is only to see the ouster of the contractors like the pet itioners, who have the certificates of competency issued by the Boiler Authoriti es. According to the petitioners, the respondent ONGC has insisted on the partic ular clause only for the North Eastern Region.

4. On an earlier occasion, when the respondent corporation issued the NIT d ated 15.9.2006 with the same stipulation, three writ petitions being WP(C) No. 4 958/2006, 6003/2006 and another were filed assailing the same. The petitioner fi led WP(C) NO. 6003/2006. Interim orders were passed to the effect that while the ONGC would be entitled to proceed with the impugned NIT, but no final order rel ating to awarding of the contract would be passed. During the pendency of the wr it petition, the ONGC filed an application being Misc. Case No. 1056/2007 with t he prayer for disposal of the writ petition being infructous and to allow the co

rporation to issue fresh tender.

5. The respondents have filed their counter affidavits. While the responden t corporation has projected its application for vacating the interim order passe d in the present proceeding by order dated 27.4.2007 providing for processing th e tender process, but not to take any final decision, as the counter affidavit, the respondent No. 4 has filed counter affidavit in WP(C) No. 1943/2007. Be it s tated here that the ONGC has filed similar application for vacating the stay ord er in WP(C) No. 2565/2007 and the same has been registered and numbered as Misc. Case No. 222/2007.

6. According to the respondent corporation the particular pre-qualification has been insisted upon in accordance with the guidelines issued by the Chief In spector of Boiler, Assam (respondent No. 4), who is the statutory regulating aut hority responsible for implementation of the various laws and regulations pertai ning to the Boilers in the State of Assam namely the Indian Boilers Act, 1923 an d the Indian Boilers Regulation 1950. It has been contended that the experience of 6 months is desired to be an integral experience for having effectively imple mented and coordinated such services successfully as a whole so as to ensure saf e and efficient operation. Repelling the contention that the petitioners being q ualified Boiler Attendants are competent to do the job, the respondent corporati on has stated that the competence of the crew of the SGU like the Boiler Attenda nt is only one of the job requirement and not the only requirement. It has been stated that a Boiler Attendant independently is not competent to deal with the c ontract in its entirety involving work in an oil mine, which is complicated and risky.

7. Controverting the claim of the petitioner that the particular stipulatio n has been made applicable only in respect of NE Region, it has been stated that the tender referred to by the petitioners issued by the ONGC Ahmedabad is for M obile Steaming Units (MSU) used for applying steam in oil wells/oil flow lines u nlike the present case in which stationary SGUs are hired with qualitative diffe rence like mode of tendering, duration, technical experience requirement etc. It has also been stated that even in the tender relating to ONGC, Ahmedabad, there is a pre-qualification criterion of having had minimum 3 years experience of pr oviding operation and maintenance services in similar lines in oil and gas speci fic companies during the last 7 years.

8. In the counter affidavit filed by the respondent No. 4, the contentions raised by the respondent corporation have been supported. It has been stated tha t there has been a series of deliberations and considerations on various issues before the issuance of the guidelines which stipulated the inclusion of the prov ision of 6 months experience as a pre-qualification. The respondent No. 4 has an nexed the Annexure-1 and 2 letters dated 11.5.2004 and 25.5.2004 calling for rep ort on Charter Hiring of Boiler in ONGC. In the report, the following has been e mphasized:

> Thereafter, it may kindly be advised that experience of running Boilers, under no circumstances, be clubbed with experiences of the equipments as mentioned ab ove, it is only the experience of operation of Boilers, in similar sites, for a suitable period as may be stipulated by you, minimum period of six months which has to be considered as pre-requisites only while supplying Boilers on chartered hiring basis for any Agencies/ Contractor to avoid any future complicacies. Further. For compressive preparation of the tender, the nearest Branch Offices o f this Boiler Directorate has to be consulted who will make subsequent discussio n with Chief Inspector of Boilers, Assam, before finalizing tender paper for all clauses to be incorporated in the tender.

9. The respondent No. 4 has also been referred to the Annexure 3 and 4 lett ers dated issued to the ONGC on the subject of guidelines for Boilers on Charter

ed hiring basis under provisions of Indian Boiler Act, 1923.

10. Mr. B.D. Konwar, and Mr. P.D. Nair, learned counsel appearing for the respective petitioner have submitted that the pre-qualification clause in the NIT is illegal and arbitrary and has been inserted only to see the ouster of the contractors like the petitioners. Referring to the earlier stand of the respondent corporation in the earlier round of litigation mentioned above, Mr. Konwar submitted that the ground on which the earlier writ petitions were branded as infructuous being available in respect of the impugned NIT, the same very respondent corporation cannot now proceed with the same. Thus, in a nutshell, his submission is that by efflux of time and in view of the operation of the interim order the NIT has become infructuous. However, in view of the stand of the respondent corporation that the impugned NIT and the process thereof is very much alive, he insisted for disposal of the writ petition in merit. Additionally, Mr. P.D. Nair, learned counsel for the petitioner in WP(C) No. 2565/2007 has argued that entire exercise on the part of the respondent corporation smacks malafide and colourable exercise of power requiring interference of this Court.

11. Mr. G.N. Sahewalla, learned Sr. Counsel assisted by Ms. S. Senapati, countering the above arguments have submitted that the writ Court in absence of any arbitrary exercise of power will be reluctant to exercise the power of judicial review under Article 226 of the Constitution of India so as to interfere with the particular stipulation made in the impugned NIT. He submitted that having regard to the nature of the work involves, the pre-qualification insisted upon cannot be said to arbitrary, unfair and unreasonable. As regards the plea of the learned counsel for the petitioner that like in the earlier writ proceeding, this time also, the NIT has become infructuous, Mr. Sahewalla, upon instruction submitted that the ONGC is very much interested to go ahead with the tender process and to finalize the same and any amount of delay would seriously tell upon the interest of the ONGC and for that matter public interest. In support of his submissions, he has placed reliance on two decisions of the Apex Court reported in (2004) 4 SCC 19 (Directorate of Education Vs. Educomp Datamatics Ltd.) and (2005) 4 SCC 435 (Global Energy Ltd. Vs. Adani Exports Ltd.).

12. I have given my anxious consideration to the submissions made by the learned counsel for the parities and the materials on record. In the normal circumstances if a contractor does not fulfill the eligibility criteria stipulated in the NIT, he cannot make a grievance against the same. However, it is the contention of the petitioners that the pre-requisite qualification stipulated in the NIT is arbitrary and cannot be the requirement for the works involved. According to the respondents the particular clause in the NIT has been provided in accordance with the guidelines issued by the respondent No. 4, who is the statutory regulatory authority. This contention of the respondent corporation finds support from the affidavit in opposition filed by the respondent No. 4. It cannot be said that the respondent corporation acted arbitrarily towards ensuring effective implementation and co-ordination of the works involved ensuring safety and efficient operations. It has been rightly contended by the respondent corporation that the competence of the crew of the SGU will have to be judged as a unit and not in reference to any particular Boiler Attendant, who independently may not be competent enough to deal with the contract in its entirety which involves works in oil mine, which is undoubtedly complicated and risky.

13. The comparison, which the petitioners have sought to make in reference to the NIT issued by the ONGC, Ahmedabad so as to contend that the impugned NIT stipulating the particular clause has been issued only in respect of NE Region does not find support from the own pleadings of the petitioners. Unlike the works involved in the instant NIT, in the NIT issued by ONGC Ahmedabad, the works involved is Mobile Steaming Units (MSU) used for applying steam in oil wells/oil flow lines. There is no manner of doubt that both the works and the parameters and yardstick thereto are quite different. Even in the said NIT of ONGC, Ahmedabad,

there is requirement of pre-qualification of having had minimum 3 years of experience of providing operation and maintenance services in similar lines during the last 7 years. If the plea of the petitioners is to be accepted, then in that case, they will have to be held eligible even in respect of the NIT issued by the ONGC, Ahmedabad, although they are not so.

14. As has been reiterated time and again in various decisions of the Apex Court, the scope of judicial review is very limited in respect of terms of NIT unless the same is wholly arbitrary, discriminatory or actuated by malice. It is in this regard, Mr. Sahewalla, learned Sr. Counsel for the respondent corporation has placed reliance on the decisions in Educomp Datamatics and Adani Export Ltd. (supra).

15. In Tata Cellular Vs. Union of India reported in AIR 1996 SC 11 dealing with the power of judicial review in contractual matters, the Apex Court emphasized the need for the Court to determine a particular policy or particular decision taken in fulfillment of that policy applying the test of fairness. The extent of the duty to act fairly will vary from case to case. Shortly put by the Apex Court, the grounds upon which an administrative action is subject to control by judicial review can be classified under illegality, irrationality (Wednesbury unreasonableness) and procedural impropriety. From the materials on record, it cannot be said that the respondents have acted in any such manner so as to interfere with the impugned NIT.

16. In Air India Ltd. Vs. Cochin International Airport reported in (2000) 2 SCC 617, the Apex Court reiterating the principles relating to judicial review emphasized that the Court should exercise its discretionary power with great caution and only in furtherance of overwhelming public interest. The Court cannot interfere with the decision, but it can interfere with the decision making process on grounds of malafides, unreasonableness or arbitrariness. In the instant case, none of the elements is present.

17. In Ramchandra Murarilal Bhattar Vs. State of Maharashtra reported in (2007) 2 SCC 588, the Apex Court referring to its earlier decision in New Horizons Ltd. Vs. Union of India reported in (1995) 1 SCC 478 observed thus :

> In the matter of grant of tender the State cannot act as a private person having regard to Article 14 of the Constitution of India. It was categorically opined that departing from the narrow legalistic view the courts have taken note of the realities of the situation which, by no stretch of imagination, would mean that the court would substitute itself in the place of a statutory authority. The court in a case of this nature must exercise judicial restraint. It may be one thing to say that having regard to the public interest, the Court may itself invite bids so as to verify the justification of accepting a palpably lower bid as was done in Ram & Shyam Co. Vs. State of Haryana, reported in (1985) 3 SCC 267, but it is another thing to say that the court would under all circumstances not allow a play in the joints in favour of the employer.

18. Whether and in what conditions the terms of a notice inviting tenders can be a subject matter of judicial scrutiny, has been examined in considerable detail in Directorate of Education Vs. Edocmp Datamatics Ltd. Reported in (2004) 4 SCC 19. The Directorate of Education, Government of National Capital Territory of Delhi had taken a decision to establish computer laboratories in all government schools in NCT area and tenders were invited to provide hardware for this purpose. For the final phase of 2002-2003, tenders were called for 748 schools and the cost of the project was approximately Rs. 100 crores. In view of the difficulty faced in the earlier years where the lowest tenders were not able to implement the entire project, a decision was taken to invite tenders from firms having a turnover of Rs. 20 crores or more for the last three financial years ending with 31.3.2002, as it was felt that it would be easier for the department to deal

with one company which is well managed and not with several companies.

19. Some of the firms filed writ petitions in the Delhi High Court challenging the clause of NIT whereby a condition was put that only such firms which had a turnover of Rs. 20 crores or mote for the last three financial years would be eligible. It was contended before the High Court that the aforesaid condition had been incorporated solely with an intent to deprive a large number of companies imparting computer education from bidding and monopolise the same for big companies. The writ petition was allowed and the clause was struck done as being arbitrary and irrational. On appeal, the Apex Court reversed the judgment of the High Court basically on the ground that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have a free hand to settling the terms of the tender. The Courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice, the court cannot order change in them.

20. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle done the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of the Apex Court, it cannot be said that the eligibility criteria by way of providing pre-requisite qualification is an arbitrary exercise of power.

21. This now leads us to the last straw of argument advanced by Mr. Konwar, learned counsel for the petitioner in WP(C) No. 1943/2007 that as per the own admission of the respondent corporation, the writ petitions have become infructuous inasmuch as the respondents cannot now proceed with the tender process. This argument has been advanced in view of the stand of the respondent corporation in the earlier writ proceeding that the same had become infructuous by efflux of time. Does it mean that after thwarting the process of the tender, the petitioner could contend each and every time that by efflux of time, the tender process has become redundant? Mr. Sahewalla, learned Sr. Counsel for the corporation has categorically stated that the tender process has not become infructuous and that the tenderers are very much in the field and the respondent corporation is keen to proceed with the same. In such a situation, it will be too much to fall back on the earlier writ proceeding, being oblivious of the merit of the case of the petitioners.

22. For all the foregoing reasons and conclusions, I am of the considered opinion that both the writ petitions merit dismissal, which I accordingly do. The stay order passed in both the writ petitions stand vacated. The respondent corporation may now proceed with the tender process initiated by the impugned NIT and complete the same in accordance with law.

23. Both the writ petitions are dismissed, without, however, any order as to costs.